88-1184
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TENNESSEE WATER QUALITY CONTROL BOARD, EUGENE FOWINKLE, COMMISSIONER, TENNESSEE DEPARTMENT OF PUBLIC HEALTH,
Petitioners,

vs.

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY AND TENNESSEE VALLEY AUTHORITY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM M. LEECH, JR.
Attorney General and Reporter
State of Tennessee

WILLIAM B. HUBBARD
Chief Deputy Attorney General

FRANK J. SCANLON
Deputy Attorney General

MICHAEL D. PEARIGEN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-5861
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Can the State of Tennessee exercise its inherent police power to regulate water pollution or is its authority limited solely to an authority to administer the National Pollution Discharge Elimination System pursuant to section 402(b) of the Federal Clean Water Act, 33 U.S.C. § 1342(b)?

2. Does the waiver of sovereign immunity with respect to federal facilities in section 313 of the Federal Clean Water Act, 33 U.S.C. § 1323, subject the TVA's Ocoee Dam No. 2 Hydroelectric Project to State authority, including the permitting requirements of the Tennessee Water Quality Control Act, T.C.A. § 69-3-101 *et seq.*?

3. Was the administrative proceeding by which the State of Tennessee would have determined the applicability of its water quality law to TVA's Ocoee Dam No. 2 Hydroelectric Project improperly removed to Federal District Court under section 313 of the Federal Clean Water Act?

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EUGENE FOWINKLE, COMMISSIONER, TENNESSEE
DEPARTMENT OF PUBLIC HEALTH,
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TENNESSEE VALLEY AUTHORITY AND
TENNESSEE VALLEY AUTHORITY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, Tennessee Water Quality Control Board, et al., respectfully request a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on September 23, 1983, and as to which the Petitioners' Petition for Rehearing was denied on October 20, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals (set forth in the Appendix at A-1) is reported at____F.2d____(6th Cir. 1983). The opinion of the Court of Appeals reviews the District Court opinion (set forth in the Appendix at A-17) which is reported at ____ F.Supp.____(M.D. Tenn. 1982).

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on September 23, 1983, the Court's Order denying the Petitioners' Petition for Rehearing (set forth in the Appendix at A-16) was entered on October 20, 1983, and this Petition for Certiorari was filed within ninety (90) days of the latter date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves an interpretation of §§ 101(b) (33 U.S.C. § 1251(b)), 313(a) (33 U.S.C. § 1323(a)), 402 (33 U.S.C. § 1342), and 510 (33 U.S.C. § 1370) of the Federal Clean Water Act, as those provisions relate to the scope of the State of Tennessee's authority to issue state water quality permits pursuant to T.C.A. § 69-3-108 (formerly T.C.A. § 70-330). The above-referenced federal statutes are set forth in the Appendix, beginning at A-25. The above-referenced Tennessee statute is set forth in the Appendix at A-33.

STATEMENT OF THE CASE

This case involves the authority of the State of Tennessee to apply state water pollution control requirements to federal facilities by virtue of the waiver of sovereign immunity clause provided by § 313(a) of the Federal Clean Water Act (CWA), 33 U.S.C. § 1323(a), which provides, in pertinent part:

> Each. . .[entity] of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and

abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

The Tennessee Valley Authority (TVA) owns the Ocoee Dam No. 2 Hydroelectric Project, consisting of a diversion dam connected downriver to a powerhouse by a wooden flume approximately four and one-half (4½) miles long.[1] TVA decided in 1979 to reopen its Ocoee Project following completion of repairs on the flume which had necessitated its closure in 1976. The Commissioner of the Tennessee Department of Health and Environment (TDHE), pursuant to the Tennessee Water Quality Control Act, T.C.A. § 69-3-101 *et seq.* (Tennessee Act), informed TVA that operation of the Ocoee Project consituted an "alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the State", pursuant to T.C.A. § 69-3-108(b)(1). Furthermore, he found that the project constituted the "development of a natural resource" which would result in the alteration of the properties of waters of the State, pursuant to T.C.A. § 69-3-108(b)(4). Both of these activities are unlawful without a valid state water quality permit under T.C.A. § 69-3-108(b). TVA filed an appeal of this determination to the Tennessee Water Quality Control Board, pursuant to T.C.A. § 69-3-118(a)(2).

This administrative appeal was filed and then removed to Federal District Court on the same day by TVA, and was consolidated with a declaratory judgment action, also brought by TVA, regarding the State's authority to regulate TVA facilities. In the District Court, TVA argued that § 313 only applied to

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[1] Operation of the project diverts the entire river out of its natural streambed for this length, leaving the streambed essentially dry. As noted by the Sixth Circuit below, "As a result of the shutdown, the Ocoee [River] has been allowed to run in its natural course along the streambed and it has provided excellent rafting and canoeing." Appendix at A-2.

those federal facilities which caused the discharge or runoff of pollutants. The State argued that § 313(a) makes federal "activities" resulting in the discharge or runoff of pollutants subject to State water pollution laws, but that *all* federal "facilities" must comply with such State laws, *irrespective of whether they cause a discharge or runoff of pollutants.* Alternatively, the State argued, and demonstrated by the only proof in the record, that a discharge of pollutants could be caused by the Ocoee Dam No. 2 Hydroelectric Project. The District Court ruled that CWA § 313 removed federal immunity for compliance with state pollution laws only for those federal facilities resulting in a discharge or runoff of pollutants. Appendix at A-24. The District Court granted TVA summary judgment because, in its opinion, the project would merely result in the diversion of the river, rather than a discharge or runoff of pollutants. *Id.*

On appeal, the Sixth Circuit affirmed the District Court's decision. The Court of Appeals concluded that the State administrative proceedings "were removable for the purpose of determining the federal question of the extent to which Congress had waived sovereignty", Appendix at A-15, and thus declined to decide whether State administrative proceedings are removable to Federal District Courts as a general matter. The Court of Appeals then changed direction and explicitly declined to decide the issue of "the extent to which Congress had waived sovereignty" over federal facilities in § 313(a), Appendix at A-15, which was the basis of the District Court decision and the basis upon which Tennessee applied its law to the Ocoee Project. Instead, the Court of Appeals concluded that the State lacked power to regulate the pollution of its waters except through the National Pollution Discharge Elimination System established by CWA § 402, 33 U.S.C. § 1342.[2]

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[2] Section 402 establishes the National Pollution Discharge Elimination System and provides for a nationwide system of permits, known as "NPDES" permits, which are required of all entities which

The Sixth Circuit, in reaching its decision, reasoned as follows:

> The "pollution" which the Commissioner of the Tennessee Department of Health identified is not subject to control or abatement by use of the discharge permit system. The right of the State to require discharge permits is derived solely from section 402. EPA has consistently treated dams as nonpoint sources of pollution which are not subject to the discharge permit requirements of section 402. We agree with the District of Columbia Circuit [referring to *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)] that this interpretation of the Act by the agency charged with its administration and enforcement is entitled to deference. Since EPA does not require discharge permits from dam operators under section 402(a), the states may not do so under section 402(b).

Appendix at A-13. The Court of Appeals thus concluded that Tennessee could not require TVA to obtain a permit for the reconstruction and operation of the Ocoee Project. Appendix at A-13-14.

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discharge pollutants into navigable waters. The discharge of pollutants without an NPDES permit is illegal and subjects the discharger to various penalties. CWA § 301(a), 33 U.S.C. § 1311(a), and § 309(a), 33 U.S.C. § 1319(a). Initial authority to administer the NPDES is placed with EPA by § 402(a) but EPA may, under § 402(b), authorize states to issue discharge permits when it finds that they have the capacity to carry out the objectives of the program. Under § 402(c) where a valid State program is found to exist by EPA, the federal permit program is suspended and the issuance of a State discharge permit satisfies the requirements of a federal NPDES permit; in essence, the federal government withdraws from the regulatory field, recognizing the need for efficiency and the primary role of the states to regulate water pollution.

REASONS FOR GRANTING THE WRIT

This Court Needs To Correct An Erroneous And Unprecedented Ruling Of The Court Of Appeals Which Seriously Impedes The Ability Of The State Of Tennessee And Other States Located Within The Sixth Circuit To Enforce State Environmental Laws In General And Specifically Against Federal Facilities.

The issues presented by this petition are significant and potentially far reaching. The primary issue in this case, left undecided by the Sixth Circuit, is whether the § 313 waiver of sovereign immunity with respect to federal facilities allows the State of Tennessee to exercise its inherent police power to regulate the pollution of its waters; specifically, whether this inherent State power can be exercised to require the Ocoee Project to comply with the Tennessee Act. However, the Sixth Circuit ignored the State's inherent police power to regulate pollution of its waters and instead cast into doubt whether the State can enforce its *state* water pollution control requirements independently of the *federal* § 402(b) permit requirements.

There is no doubt that Tennessee has the power to prevent the pollution of its waters. This power is preserved by the Tenth Amendment to the U.S. Constitution[1] and recognized by Congress in CWA § 101(b), 33 U.S.C. § 1251(b), where it expressed its intent "To recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

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[1] The National government is one of enumerated powers. The reserved lawmaking powers of the State, however, do not derive from, or depend for their existence upon, the Constitution of the United States. At least so far as that Constitution is concerned, they are inherent. *See* U.S. Constitution, Amendment X; *United States* v. *Darby*, 312 U.S. 100, 124 (1941). In *Ohio* v. *Wyandotte Chemicals Corporation*, 401 U.S. 493, 498 n. 3 (1971), the basic principle recognized was that the states have inherent power to police the pollution of their waters, in the *absence* of a preemptive body of federal law.

eliminate pollution. . . ." Toward this end, CWA § 510(1), 33 U.S.C. § 1370(a), states that nothing in the CWA precludes or denies the rights of any state to adopt or enforce *not only* "(A) any standard or limitation respecting discharges of pollutants" *but also* "(B) *any requirement respecting control or abatement of pollution*. . . ." In addition, CWA § 510(2) states that the CWA shall not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." This State authority is made applicable to federal entities by CWA § 313.

However, the Court of Appeals concluded that the State's power to regulate water pollution is merely an authority delegated to it pursuant to § 402(b). The Court of Appeals based its conclusion on the mistaken premise that Tennessee was only trying to enforce the *federal* discharge permit requirement of § 402 with respect ot the Ocoee Project. *See* Appendix at A-11 and A-14. This premise is in error for two (2) reasons. First, Tennessee, unlike most states, has never been authorized by EPA to issue § 402 permits for federal facilities.[4]

Second, in the present case, the State of Tennessee was enforcing its comprehensive *state* water pollution standards which are made applicable to federal agencies under § 313. The Tennessee Act's original purposes are stated as establishing the State of Tennessee's obligation to protect the right of its people to unpolluted waters and to take steps to abate pollution of Tennessee waters. T.C.A. §§ 69-3-102(a) & (b). Unlike some other federal-state regulatory schemes, the Tennessee Water Quality

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[4] *See* 48 Fed.Reg. 45,397, chart at 45,398 (1983) (set forth in the forth in the appendix at A-35.) Instead, federal facilities located in Tennessee must acquire a § 402 discharge permit from EPA. Thus, the State, in requiring a water quality permit of TVA, was acting *solely* on the basis of its own independent police power and the Court of Appeals' statements to the contrary, Appendix at A-11 and A-14, are completely in error.

Control Act is not a creation of nor a vehicle for implementation of a federal statutory scheme. Indeed, the Tennessee Act was passed in 1971, the year before Congress created the NPDES program. It was only *after* Congress amended the CWA in 1972 that current T.C.A. § 69-3-102(c) was added, which states that "*an additional purpose*" of the Tennessee Act is to enable the State to participate in the NPDES program.

The Tennessee Act is not only independent of the federal law but is much more comprehensive. The State water quality permit provided by T.C.A. § 69-3-108 is much *broader in scope* than a permit to discharge from a point source.[1] For example, a permit is required under Tennessee law for "activities" which may constitute an "alteration" of various properties of the waters of the State or the development of a natural resource which may result in the alteration of various properties of waters of the State. *See* T.C.A. § 69-3-108(b)(1) & (4). The TDHE found that these conditions would be created by the operation of TVA's Ocoee No. 2 Project.

The clear and devastating inference of the Court of Appeals' decision is that Tennessee's power to regulate water pollution is superseded by federal law and drastically limited to the issuance of federal NPDES permits. In the instant case, the Sixth Circuit's decision leaves the State powerless to prevent a violation

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[1] A fact noted by several commentators, including Professor Maloney, the drafter of the 1971 Tennessee Act who states that T.C.A. § 69-3-108(b) "is intended to provide an omnibus clause making it unlawful for any person. . .to alter *in any manner* the properties of the waters of the State without securing. . .a permit. . . ." Maloney, *The Tennessee Water Quality Control Act of 1971*, 25 Vand.L.Rev. 331, 351 (1972). (Emphasis added). *See also* Juergensmeyer, *The Tennessee Water Quality Control Act of 1971: A Significant New Environmental Statute*, 25 Vand.L.Rev. 323, 328 (1972) ("In essence the Act makes it unlawful for any person to alter the water quality of any Tennessee rivers without a permit from the Commissioner. *All activities* affecting water quality are included *rather than just discharges.*") (Emphasis added).

of its law by TVA's Ocoee Dam No. 2 Hydroelectric Project. This erroneous limitation affects Tennessee and every other state within the Sixth Circuit which enforce state water pollution control laws. Furthermore, the Sixth Circuit's interpretation of the federal-state relationship under the CWA could apply to other environmental regulatory schemes in which the states and the federal government form a regulatory partnership. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7401 *et seq.*; Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*

The narrow but important issue argued before the Court of Appeals, but left undecided by it, is the extent to which Tennessee can apply its water quality control law to TVA's Ocoee Project under the federal government's waiver of sovereign immunity provided in CWA § 313. By failing to decide this issue, the Sixth Circuit defeated the clear Congressional intent that *all* federal facilities, including the Ocoee Project, be subject to the full scope of Tennessee's water quality control law as if they were private citizens.[6]

Equally disturbing is the Court of Appeals' failure to address Tennessee's challenge to the improper removal of administrative proceedings from the Tennessee Water Quality Control Board to Federal District Court. Appendix at A-

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[6] As the Senate Committee Report stated in regards to § 313, "The Federal Government cannot expect private industry to abate pollution if the Federal Government continues to pollute. This section requires that Federal facilities meet all control requirements as if they were private citizens." S. Rep. No. 92-414, 92nd Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. and Ad. News, at 3733-34. Congress reiterated its intent when it amended § 313 in 1977, the Senate Committee Report then stating, "This section clarifies section 313 to provide that all Federal facilities must comply with all substantive and procedureal requirements of Federal, State, or local water pollution control laws. . . ." S. Rep. No. 95-370, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. and Ad. News, at 4392.

14-15. The State argued that the removal provision in § 313(a)[7] in no way expands existing rights of removal under 28 U.S.C. § 1441 and that State administrtive proceedings are not removable under 28 U.S.C. § 1441. The Sixth Circuit discussed but declined to decide whether State administrative proceedings are removable under 28 U.S.C. § 1441, an issue upon which the lower federal courts are split.[8] As a practical matter, the Board was never given an opportunity to determine if the Ocoee project was subject to the State's regulation under the Tennessee water quality control law and, if so, whether operation of the project was permissible. Conceivably, the Board could have resolved these issues in favor of TVA, thus rendering this litigation unnecessary.

CONCLUSION

Before the Court of Appeals was the narrow but important question whether CWA § 313 allows the State to apply its laws "respecting the control and abatement of water pollution" *only* to those facilities causing a discharge or runoff of pollutants, as

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[7] Section 313(a) provides, in pertinent part:

> Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441, *et seq.* of Title 28.

[8] *Compare, e.g., County of Nassau* v. *Cost of Living Council*, 499 F.2d 1340 (Temp. Emerg. Ct. of App. 1974), with *Volkswagen de Puerto Rico, Inc.*, v. *Puerto Rico Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972). The Court of Appeals noted these and other conflicting cases on this issue, Appendix at A-14-15.

TVA argued *or,* as the State and EPA itself argued,[*] to any federal facility *which causes pollution by whatever means.* The Court of Appeals' decision instead painted with a broad brush to strike against the very source of State power. Its decision not only calls into question the ability of the states to enforce water pollution according to their own laws, but fails to clarify which federal facilities Congress intended to subject to State water pollution laws. Therefore, the petitioners respectfully request a Writ of Certiorari issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

William M. Leech, Jr.
Attorney General and Reporter
State of Tennessee

William B. Hubbard
Chief Deputy Attorney General

Frank J. Scanlon
Deputy Attorney General

Michael D. Pearigen
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-5861

Attorneys for Petitioners

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[*] The Ocoee River Council and the United States, on behalf of EPA, were permitted to participate as amicus curiae in the Sixth Circuit.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Petition has been mailed this the 17th day of January, 1984, to the below-referenced counsel:

Honorable Rex E. Lee
United States Solicitor General
Department of Justice
Washington, D.C. 20530

Herbert S. Sanger, Jr.
James E. Fox
Robert C. Glinski
Brent R. Marquand
Tennessee Valley Authority
Office of General Counsel
400 Commerce Street
Knoxville, Tennessee 37902

MICHAEL D. PEARIGEN
Assistant Attorney General

APPENDIX

APPENDIX A

No. 82-5288

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America Ex Rel.
Tennessee Valley Authority and
Tennessee Valley Authority,
Plaintiffs-Appellees,

v.

Tennessee Water Quality Control
Board, Et Al.,
Defendants-Appellants.

Appeal from the
United States District
Court for the Middle
District of Tennessee.

Decided and Filed September 23, 1983

Before: Edwards Chief Judge; Lively, Circuit Judge; and Guy, District Judge.*

Lively, Circuit Judge. The question in this case is whether the Tennessee Water Quality Control Board may require the Tennessee Valley Authority (TVA) to acquire a state permit for the reconstruction and operation of a dam and flume on a navigable

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* The Honorable Ralph B. Guy, Jr., Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

waterway within the State of Tennessee. The case arises under the Federal Water Pollution Control Act, as amended, commonly referred to as the Clean Water Act (the Act), 33 U.S.C. § 1251 *et seq.* (1976 ed. and Supp. V).

I.

A.

A private power company built a hydroelectric unit on the Ocoee River in Tennessee in 1913. Water was diverted to the power plant by the second in a series of three dams on the river. This dam is referred to as Ocoee No. 2. TVA acquired all three dams in 1939 and built an additional dam in 1941. Ocoee No. 2 consists of a rock-filled timber crib dam which can divert water into a wooden flume that leads to a powerhouse approximately four and one-half miles downstream. The dam does not impound water, but merely diverts it. From the time the project was put into operation until 1976 the four and one-half miles of riverbed between the dam and the powerhouse contained very little water, consisting primarily of seepage through the dam. In September 1976 TVA shut down the project in order to repair the dam and the steel support trestles of the flume. As a result of the shutdown the Ocoee has been allowed to run its natural course along the streambed and it has provided excellent rafting and canoeing. Since the stretch of the river between the dam and the power plant is adjacent to a U.S. Highway the recreational area has been accessible to large numbers of visitors.[1]

B.

TVA determined to reopen the Ocoee No. 2 project after completion of the repairs without allowing for recreational releases of water into the riverbed between the dam and

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[1] This statement of facts is derived from the district court's opinion in a related case. See *Ocoee River Council* v. *T.V.A.*, 540 F. Supp. 788, 791 (E.D. Tenn. 1981).

powerhouse. The decision was made after Congress rejected a requested appropriation to provide for the loss of revenue from electricity sales which would result from providing for 82 days of recreational release of water annually. Suit was filed by the Ocoee River Council, a non-profit corporation chartered in part to promote recreational uses of the Ocoee River, a private individual who uses the river for recreational purposes and a commercial rafting company to enjoin further work on the project for alleged violation of a number of federal statutes. The district court found that TVA had prepared an adequate final environmental impact statement in connection with its decision to reconstruct Ocoee No. 2. *Ocoee River Council* v. *T.V.A.*, 540 F.Supp. 788, 795-96 (E.D. Tenn. 1981). However, the court also found that the decision to proceed with the reconstruction without any provision for recreational use of the Ocoee River between the dam and the powerhouse was deficient under the National Environmental Policy Act (NEPA) and therefore "not in accordance with law." 5 U.S.C. § 706(2)(A). 540 F.Supp. at 798. Rather than granting an injunction, however, the district court stayed the action in order for TVA to reconsider its decision in light of the NEPA requirements.

After holding several public hearings TVA ratified its previous decision to rehabilitate the Ocoee No. 2 hydroelectric facility and directed that it be operated exclusively for power generation in the absence of some method for ensuring compensation for power losses associated with recreational releases. The general manager of TVA was granted authority to provide for approximately 82 days of recreational releases per year upon development of appropriate compensation arrangements, which were not limited to appropriations but could include concession, license or user fees or other sources of funding. The district court then found that TVA's decision had been reached after evaluation of environmental factors as mandated by NEPA, along with other proper considerations, and granted TVA's motion for summary judgment, dismissing the action. *Id.* at 800-02.

C.

The plaintiffs did not appeal the final judgment of the district court. However, the Ocoee River Council had filed a complaint with the Commissioner of the Tennessee Department of Public Health prior to entry of the final judgment by the district court. This complaint alleged that the Ocoee No. 2 project would violate the Tennessee Water Quality Control Act unless TVA obtained a water quality permit from the State for diversion of the Ocoee. The commissioner investigated the complaint and by a letter dated December 11, 1981 advised TVA that he had concluded "that TVA's proposed activity requires a State water quality permit pursuant to T.C.A. 70-330(b)" (Tennessee Code Annotated, Section 70-330(b)). One of the two items which the commissioner considered in reaching this conclusion was a written opinion of the Attorney General of Tennessee. In this opinion the Attorney General concluded that a state permit was required for Ocoee No. 2 because the United States Environmental Protection Agency (EPA) had approved Tennessee's permit system as contained in the Tennessee Water Quality Control Act of 1977. The Attorney General pointed out that the authority for states "to create, administer, and enforce state permit systems" under the national pollution discharge elimination system derived from section 402 of the Act, 33 U.S.C. § 1342.

II.

TVA appealed the commissioner's decision to the Tennessee Water Quality Control Board and then filed a petition to remove the proceedings to the federal district court. On the same day TVA filed a declaratory judgment action in the same district court and a motion to consolidate it with the removed action. In the original district court action TVA sought a declaration that the Tennessee Water Quality Control Board and the commissioner had no authority to regulate or interfere with TVA's projected repair and operation of Ocoee No. 2, "by requiring a permit or otherwise."

The Tennessee defendants filed a motion to remand the removed case and a motion to dismiss the declaratory judgment action. In the alternative, if remand were not granted, it filed a motion to dismiss the consolidated actions or for summary judgment. The Ocoee River Council filed a motion to intervene with a motion to remand. However, the district court did not act on the motion to intervene. This court permitted the Ocoee River Council to file a brief and to participate in oral argument as amicus curiae.

The district court granted the motion to consolidate the action, but did not rule on the motion to remand the removed action. Following extensive briefing the district court granted TVA's motion for summary judgment. The district court and the parties agreed that decision of the consolidated actions depended primarily on the proper construction of Section 313 of the Act as amended, 33 U.S.C. § 1323 (1976 ed. and Supp. V), which provides in pertinent part:

> **§ 1323. Federal facilities pollution control**
>
> (a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other

> requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 et seq. of title 28.

The district court found that section 313 waives federal sovereignty over only those activities of federal agencies resulting in the discharge or runoff of pollutants and that Ocoee No. 2 merely diverts the water from its bed for a short distance, resulting in no discharge or runoff of pollutants. In reaching its conclusion the district court pointed out that Ocoee No. 2 has been operated for many years as an integral part of a unified dam and reservoir system over which TVA has been given control by a series of congressional enactments. The court noted that Ocoee No. 2 was acquired and operated solely for the production of hydroelectric power and that Congress had refused to appropriate funds to replace lost power revenues if water releases were made for recreational purposes. The district court summarized its holding in a sentence near the end of its memoradum opinion. "The State cannot under the guise of regulation of discharge or runoff of pollutants exercise the right of control over a unified federal navigation, flood control and power operation, where federal sovereignty has been retained."

III.

A.

The state defendants and amicus Ocoee River Council argue that the district court misconstrued the impact of the words "discharge or runoff of pollutants" in section 313(a). They point out that section 313(a) has two subsections. Subsection (1) requires every department, agency, or instrumentality of the federal government having jurisdiction over any property or facility to comply with all regulations — federal, state, interstate and local — respecting the control and abatement of water pollution in the same manner as any nongovernmental entity. This duty is not modified, the defendants and amicus say, by a requirement that there be a discharge or runoff of pollutants. On the other hand, these parties read subsection (2) to require compliance by federal entities engaged in activities only if those activities result in the discharge or runoff of pollutants. Under this construction "resulting . . . in the discharge or runoff of pollutants" is a condition requiring compliance only when applied to the second category of federal involvement — "any activity." The requirement of compliance is absolute with respect to the first category — "having jurisdiction over any property or facility."

In the alternative the defendants argue that even if the district court's construction of section 313 is correct Ocoee No. 2 is a facility "resulting" in discharge or runoff of pollutants. This argument is based on the broad definition of "pollution" found in 33 U.S.C. §1361(19). (The term "pollution" means "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water"). It is clear that federal agencies are subject to the procedural as well as the substantive provisions of programs respecting the control and abatement of water pollution. Since the Tennessee permit requirement is part of its approved water quality control program, it follows that TVA must obtain a state permit before pro-

ceeding with any project which will alter the composition of the Ocoee River waters, the defendants and Ocoee River Council argue.

B.

TVA asserts that Congress provided for the unified development and control of the Tennessee River System by TVA and that the State of Tennessee has no authority to regulate its activities in the absence of express congressional consent thereto. TVA finds no such consent in section 313, contending that it applies only to runoff and "point source" discharge of pollutants. A dam which merely diverts the water of a river, adding no foreign substance and creating no runoff, is not subject to any state requirement, according to TVA. It relies on various definitions contained in section 502 of the Act, 33 U.S.C. § 1362:

> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.
>
> • • •
>
> (12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.
>
> • • •
>
> (14) The term "point surce" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal

feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

• • •

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

TVA relies in particular on the use of the word "addition" in both subsections of 33 U.S.C. § 1362(12), *supra,* and asserts there is no claim that the diversion at Ocoee No. 2 adds any pollutants to the river.

The state defendants also argue that a 1977 amendment to section 313 made it clear that a broad waiver of sovereign immunity was intended by Congress. TVA maintains that the 1977 amendment did not change the extent to which section 313 waived immunity from state or local control; it merely made it clear that where federal agencies are subject to state or local regulation they must comply with state or local procedural as well as substantive requirements. The qualifying phrase, "resulting, or which may result, in the discharge or runoff of pollutants" appeared in 1972 version and was unchanged by the 1977 amendment to section 313. We agree with TVA's interpretation of the 1977 amendment. This amendment was designed to make it clear that federal agencies are subject to procedural as well as substantive provisions of state water quality control laws. It was adopted, at least in part, in response to *EPA* v. *California ex rel. State Water Resources Control Board,* 426 U.S. 200 (1976), in which the Supreme Court held that federal facilities were required to comply with state substantive requirements only. See S. Rep. No. 95-370, p. 67, *reprinted in* [1977] U.S. Code Cong. & Adm. News 4392.

C.

EPA was permitted to file a brief and to participate in oral argument. Its position is that the district court erred in concluding that section 313 is not applicable to federal dam operators. It argues, in agreement with the defendants and the Ocoee River Council, that "discharge or runoff of pollutants" in section 313 modifies "activities" only and that federal property and facilities are subject to state regulation without regard to whether they "result" in discharge or runoff of pollutants. However, EPA contends, the Tennessee authorities erred in treating Ocoee No. 2 as a "point source" which required a discharge permit for its continued operation. Instead the State should have treated the project as a "nonpoint source" of pollution. It relies on a definition in 33 U.S.C. § 1314(f)(2)(F) of nonpoint sources of pollution as pollution resulting from —

> (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

EPA argues that the State must deal with nonpoint sources of pollution under section 208 of the Act, 33 U.S.C. § 1288, a comprehensive statutory scheme for identifying areas having substantial water quality control problems and providing for federally funded areawide waste treatment management by the states. EPA agrees with TVA that section 313 does not give the Tennessee Water Quality Control Board authority to utterly frustrate the agency's congressionally mandated hydroelectric operations by altering the use of Ocoee No. 2 to assure an adequate flow of water for recreational rafting below the dam. EPA states in its brief, "The State's authority under Section 313 is limited to establishing reasonable water pollution controls that are not inconsistent with the purposes for which Ocoee Dam No. 2 was purchased."

IV.

A.

This case must be decided on the basis of the Clean Water Act in its entirety, not merely on a construction of section 313. The clear purpose of that section is to make federal agencies subject to applicable state and local reguirements, procedural as well as substantive, respecting the control and abatement of water pollution. However, the authority of the states over navigable waters is limited by other provisions of the Act.

One of the primary objectives of the Act, as stated in section 101, 33 U.S.C. § 1251(a)(1), is to achieve a national goal "that the discharge of pollutants into the navigable waters be eliminated by 1985." The Act seeks to achieve this particular objective by creating a national pollutant discharge elimination system (NPDES) based on the issuance of permits for the discharge of pollutants. Under section 402(a)(2) of the Act, 33 U.S.C. § 1342(a)(2), the Administrator of EPA is required to prescribe the conditions and other requirements of the Act. Section 402(b), 33 U.S.C. § 1342(b), permits a state to administer its own permit program for discharges into navigable waters within its jurisdiction upon approval of the program by EPA. Here Tennessee relied specifically on its permit program approved by EPA pursuant to § 402 as the basis of its attempt to regulate the diversion of water at Ocoee No. 2.

EPA has consistently taken the position that the section 402 permit system does not apply to dams because they are "nonpoint sources" of pollution, rather than dischargers of pollutants. In *National Wildlife Federation* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), an envoronmental group sought a declaration that the Administrator of EPA had a nondiscretionary duty to require dam operators to apply for pollutant discharge permits under section 402(a) of the Act. The plaintiff argued that any adverse change in the quality of reservoir water from its natural state involves a "pollutant," and release of

such water through a dam into the downstream river is an "addition of a pollutant" from a point source. EPA contended that for addition of a pollutant to occur within the definition in section 502(12) the point source must introduce the pollutant into the water. Although alterations in the properties of the water are "pllution" under the broader definition contained in section 502(19) ("the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of the water"), all alterations do not fit the narrower definition of "pollutants" contained in section 502(6) ("dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water"). Since the section 402 permit system applies only to the discharge of pollutants EPA argued that it was not directed by the Act to require dam operators to obtain permits.

The court in *National Wildlife Federation* concluded that EPA's construction of the Act is entitled to considerable deference. Its treatment of dams as nonpoint sources of pollution was found to represent a considered decision which was reasonable when the purposes and objects of the Act are considered. The court agreed with EPA that Congress had treated "pollutants" and "pollution" differently and that section 402 is concerned with the addition of pollutants, not with water pollution generally. It quoted with approval from *Missouri ex. rel. Ashcroft* v. *Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982), a case relied on by the district court in the present case:

> "[T]he discharge of a pollutant requires an 'addition' of a pollutant from a 'point source' and neither term applie[s] to soil erosion or the oxygen content of water."

693 F.2d at 175. The court in *National Wildlife Federation* pointed out that Congress viewed the NPDES program as the

most effective weapon against pollution, yet limited its application to situations involving the addition of pollutants from point sources. Water pollution arising from nonpoint sources is to be dealt with differently, specifically through the device of areawide waste treatment management by the states. Similar conclusions were reached in *South Carolina Wildlife Federation* v. *Alexander*, No. 76-2167-2 (D.S.C. April 26, 1982)(unreported decision).

B.

The present case is unusual. The defendants and Ocoee River Council are not concerned with the operation of the power plant or the condition of the water returned to the river after it has been used for the production of electricity. Their only claim is that the comparatively small quantity of water which seeps through the dam is "polluted" by changes in its physical and chemical properties occurring while it flows through the four and one-half miles of riverbed between the dam and the power plant. There is no claim that any pollutants as defined in the Act are added to the river water by the diversion into or through the flume.

The "pollution" which the Commissioner of the Tennessee Department of Health identified is not subject to control or abatement by use of the discharge permit system. The right of the State to require discharge permits is derived solely from section 402. EPA has consistently treated dams as nonpoint sources of pollution with are not subject to the discharge permit requirements of section 402. We agree with the District of Columbia Circuit that this interpretation of the Act by the agency charged with its administration and enforcement in entitled to deference. Since EPA does not require discharge permits from dam operators under section 402(a), the states may not do so under section 402(b). Accordingly, we affirm the judgment of the district court in its holding that Tennessee could not require TVA to obtain a permit for the reconstruction and operation of Ocoee No. 2.

Our decision does not mean that we adopt the construction of section 313 urged upon us by TVA and followed by the Eighth Circuit which held that a federal agency is subject to state water quality control laws only if it is causing a discharge or runoff of pollutant. See *Missouri ex rel. Ashcroft* v. *Department of the Army, supra,* 672 F.2d at 1304. We merely hold that a state may not subject a federal agency to the requirements of its discharge permit program when the pollution complained or does not result from the discharge of pollutants from a point source. A dam, as a nonpoint source, may be subject to some state or local regulation as part of a section 208 areawide waste treatment management program. We do not undertake to determine the limits of such authority in this case since the state sought only to require a permit under authority derived from section 402.

C.

The defendants and amici curiae have argued that, regardless of our decision in the declaratory judgment action, we should remand the removed proceedings to the Tennessee Water Quality Control Board to complete its administrative consideration of the complaint which precipitated this litigation. They argue that removal under 28 U.S.C. § 1441 applies only to state court actions, not to administrative proceedings. There is support in case law for this administrative proceedings are subject to removal. Compare *County of Nassau* v. *Cost of Living Council,* 499 F.2d 1340 (Temp. Emerg. Ct. of App. 1974)), and *California Packing Corp.* v. *I.L.W.U. Local 142,* 253 F.Supp. 597 (D.Hawaii 1966), with *Volkswagen de Puerto Rico, Inc.* v. *Puerto Rico Labor Relations Board,* 454 F.2d 38 (1st Cir. 1972); *Floeter* v. *C.W. Transport, Inc.,* 597 F.2d 1100 (7th Cir. 1979) (per curiam), and *United States* v. *Pennsylvania Environmental Hearing Board,* 377 F.Supp. 545 (M.D. Pa. 1974).

We do not consider it necessary to decide whether administrative proceedings are removable generally. Section 313 expressly preserves to federal agencies the right to remove to an

appropriate district court "any proceeding" to which it is subject thereunder. Since the Tennessee Water Quality Control Board was relying on section 313 in seeking to require TVA to obtain a permit we believe its proceedings were removable for the purpose of determining the federal question of the extent to which Congress had waived sovereignty. Even if the proceedings were improperly removed, however, a remand would be pointless in view of our decision in the declaratory judgment action.

The judgment of the district court is affirmed. No costs are allowed. Each party will pay its own costs on appeal.

NO. 82-5288

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States Of America Ex Rel. Tennessee Valley Authority and Tennessee Valley Authority
Plaintiffs-Appellees

v.

Tennessee Water Quality Control Board, Et Al.
Defendants-Appellants

ORDER
(Filed Oct. 20, 1983)

BEFORE: LIVELY, Chief Judge; EDWARDS, Circuit Judge; and GUY, District Judge.*

Upon consideration of the petition for rehearing filed herein by the defendants-appellants the court concludes that the issues raised in the petition were fully considered and correctly decided upon the original submission and decision of this case and that the panel did not misapprehend the facts or the issues. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

* The Honorable Ralph B. Guy, Jr., Judge, U.S. District Court for the Eastern District of Michigan, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 82-3031
No. 82-3030

United States of America

vs.

Tennessee Water Quality Control Board, Et Al.

MEMORANDUM
(Filed April 9, 1982)

This case involves the application of § 313 of the Clean Water Act, 33 U.S.C. § 1323, to one of the Tennessee Valley Authority installations. Jurisdiction is asserted under 28 U.S.C. §§ 1331, 1337 and 1345. The facts are agreed as follows:

Ocoee No. 2 is located on the Ocoee River, a tributary of the Hiwassee, in southeastern Tennessee. It consists of a rock-filled and concrete-covered timber crib diversion dam at river mile 24.2, a powerhouse at river mile 19.7, and a 4.6-mile wooden flume. Water from behind the dam is diverted into the flume, in which it is carried to a point above, and then down to, the powerhouse where it is used to generate electric power.

Ocoee No. 2 was built in 1912-13 by the East Tennessee Power Company, a predecessor of the Tennessee Electric Power Company (Tennessee Electric Power). In 1939, TVA entered into a contract with the Commonwealth and Southern Corporation (a holding company which controlled Tennessee Electric Power) and others, which provided for federal purchase of Tennessee Electric Power's generating and transmission properties

including Ocoee No. 2, and the purchase by various municipalities and cooperatives of its distribution properties. Consumation of the contract was dependent on congressional approval. Specific congressional approval was given by the addition to the TVA Act of section 15c, 53 Stat. 1083 (1939), 16 U.S.C. § 831n-3 (1976). Section 15c authorized TVA to use up to $46 million of proceeds from the sale of government-guaranteed bonds "for the purchase of electric utility properties of the Tennessee Electric Power Company and Southern Tennesee Power Company, as contemplated in the contract between [TVA] and the Commonwealth and Southern Corporation and others, dated as of May 12, 1939."

As provided by the contract, Ocoee No. 2, like all of the other real property included in the federal portion of the purchase, was thereafter conveyed to the United States of America in conformity with section 4(h) of the TVA Act, 16 U.S.C. § 831c(h) (1976). Section 4(h) provides that "in the purchase of any real estate [for the TVA program]. . . the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to [TVA] as the agent of the United States to accomplish the purposes of this [Act]."

Following such conveyance, Ocoee No. 2 became and has been operated as an integral part of the TVA unified dam and reservoir system. Ocoee No. 2 dam has no storage capacity;[1] its purpose is simply to divert water from the stream into the flume. The amount of water available at Ocoee No. 2 is regulated by the operation of Blue Ridge Dam and, to a much lesser extent Ocoee No. 3 dam, upstream. Blue Ridge Dam is located at river mile 51.3 in the State of Georgia and has 183,000 acre-feet of storage capacity. It was acquired by the United States under the same 1939 contract and conveyance by which it

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[1] TVA Technical Report No. 5, The Hiwassee Valley Projects, vol. 2, at 40 (1948).

acquired Ocoee No. 2. Ocoee No. 3 dam is located at river mile 29.2 in Tennessee and has 9,100 acre-feet of storage capacity. It was built by TVA with money appropriated for that purpose by Congress, 55 Stat. 597 (1941); 56 Stat. 418 (1942). As in the case of Ocoee No. 2, the powerhouse at Ocoee No. 3 is located more than 4 river miles below the dam, and the river waters are similarly diverted except that the diversion is through a concrete tunnel rather than a wood flume.

In 1976, operation of Ocoee No. 2 was temporarily suspended because deterioration of the steel trestles supporting the flume caused a safety hazard. While it has been so shut down, water which would ordinarily have been diverted through the flume has flowed past the dam instead. The resulting stretch of water immediately below the dam, which is easily accessible from a nearby highway, has been extensively used during this period for recreational rafting. This in turn has led to the provision of commercial raft rentals and related commercial services.

After the shutdown, TVA made extensive studies, including preparation of an environmental impact statement (EIS), relating to the cost and desirability of repairing Ocoee No. 2 (including rebuilding the flume, which deteriorated during the shutdown, and some work on the dam) and returning it to operation. On the basis of these studies, TVA concluded that Ocoee No. 2 is a valuable power asset which can and should be repaired and returned to operation as a part of TVA's power system.[2] TVA also concluded that it was precluded from wholly

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[2] Section 14 of the TVA Act, 16 U.S.C. § 831m (1976), provides for allocations of the costs of dam projects constructed by or turned over to TVA, and further provides that such allocations, when approved by the President, shall be final. The cost of Ocoee No. 2 was allocated entirely to power, and such allocation was approved by the President. 1945 TVA Ann. Rep. 233-35; 1946 TVA Ann. Rep. 89. The bonds issued under section 15c of the TVA Act to finance federal purchase of Ocoee No. 2 and the other power properties involved have been repaid from power revenues provided by TVA's ratepayers. *See Hearings on H.R. 3460 and H.R. 3461 Before the House Comm. on Pub. Works*, 86th Cong., 1st Sess. 11 (1959).

or partially diverting a power asset such as Ocoee No. 2 to a nonpower use such as recreational rafting unless the TVA power system was compensated for the power lost thereby. The basis for such preclusion was section 9a of the TVA Act, 16 U.S.C. § 831h-1 (1976), and a Basic Bond Resolution which TVA adopted in 1960 under express authority contained in the 1959 revenue bond amendment to the TVA Act, 16 U.S.C. § 831n-4 (1976; Supp. IV, 1980), and which constitutes by its own terms a contract between TVA and the holders of its bonds. TVA further concluded that some recreation releases of water from behind Ocoee No. 2 dam would be desirable if, but only if, the power system were so reimbursed, and that a congressional appropriation of the necessary funds would be a practicable method of providing such reimbursement (if Congress regarded recreational rafting as warranting an appropriation).

Such an appropriation was sought and denied—first by the House Appropriations Committee in connection with TVA's fiscal year 1981 budget, and again by the Office of Management and Budget (OMB) in refusing to include a request for such funds in the overall federal budget submitted by the President for fiscal year 1982. Both the House Appropriations Committee and OMB expressed the view that the funds needed to reimburse the power system for recreation releases should be provided by recreation users themselves through a system of user fees, and OMB indicated its willingness to support legislation providing for such fees if legislation were necessary. *See Hearings Before a Subcom. of Energy and Water Development,* 96th Cong., 2d Sess. 974 (1980); H.R. Rep. No. 96-1093, 96th Cong., 2d Sess. 150 (1980).

On March 6, 1981, the Ocoee River Council, an organization formed by various commercial rafting interests and noncommercial rafters, and two other parties, one a commercial rafting company and the other an individual rafter, brought an action in the United States District Court for the Eastern District of

Tennessee, Southern Division, No. 1-81-100, seeking an injunction prohibiting such repair and restoration to service. Plaintiffs alleged that such repair and restoration would violate the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* (1976; Supp. III, 1979); the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 *et seq.* (1976; Supp. III, 1979); portions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* (1976); the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661 *et seq.* (1976), and a section of the Outdoor Recreation Act, 16 U.S.C. § 4601 (1976).

On June 9, 1981 the court (Chief Judge Frank W. Wilson) issued an order, with an accompanying memorandum, holding plaintiffs' contentions as to the Federal Water Pollution Control Act, the Fish and Wildlife Coordination Act, and the Outdoor Recreation Act to be without merit and granting TVA's motion for summary judgment with respect to those contentions. On the NEPA and APA claims, the court held that TVA's EIS for Ocoee No. 2 was adequate, but that TVA had violated NEPA by assuming that recreation releases could not legally be made from Ocoee No. 2 unless the power program were reimbursed for resulting losses in power generation. It accordingly ordered that TVA reconsider its decision in light of NEPA "without excluding recreational releases of water absent separate funding for such releases," and that it report the results of its reconsideration to the court within 90 days. In so doing, the court stayed plaintiffs' request for a preliminary injunction restraining TVA's continued work on Ocoee No. 2, and noted in the memorandum accompanying its order that:

> In reviewing the TVA's decision ... this Court may not substitute its judgment for that of the agency.... So long as the Agency complies with its obligation under NEPA to incorporate environmental concerns into its decision-making, the ultimate decision on each project belongs to the agency.

....

> Turning ... to the issue of the [probability of] the ultimate success of the plaintiffs in obtaining a full retirement of the Ocoee No. 2 project, it should be noted that the alternative of *not* reconstructing Ocoee No. 2 and of retiring the project was rejected by the final EIS. It would appear, therefore, that when the TVA reconsiders its decision upon Ocoee No. 2 with due regard for its obligations under NEPA, it is unlikely that the TVA would adopt this alternative. The Court concludes, therefore, that the plaintiffs have little prospect of ultimately obtaining a complete cessation of work on the project [memorandum at 15, 18; emphasis the court's].

The TVA Board, following reconsideration on the basis directed by the court, concluded on September 2, 1981, that Ocoee No. 2 should be restored to service; recreation releases without reimbursement to the power system would be undesirable and productive of public detriments which would outweigh any benefits to recreation; and the project should be operated for power, with recreation releases for 82 days per year if, but only if, a method—such as concession, license, or user fees—could be developed to assure reimbursement to the power system. TVA so reported to the court, and also asked that the court reconsider, in the light of section 9a of the TVA Act and TVA's Basic Bond Resolution, the portion of its memorandum which had indicated that total or partial diversion of the project to recreation at the expense of power would have been proper had TVA found—as it did not—that such diversion would be desirable. The issues involved were briefed and, on February 11, 1982, orally argued, after which the court took the matter under advisement.

Two weeks after TVA's September 2, 1981, determination, the Ocoee River Council filed a complaint with the Commissioner, Tennessee Department of Health, alleging that TVA's restoration of Ocoee No. 2 to service for generation of power will violate the Tennessee Water Quality Control Act. The com-

plaint did not state or suggest that TVA's plans involve the discharge of any foreign substance into the waters of the Ocoee River. Rather, it claimed that diversion of such waters through the restored flume would itself constitute a "degradation of these high quality recreation waters"; that TVA's determination to utilize Ocoee No. 2 for power purposes, unless power is reimbursed for generation lost through its partial diversion to recreation use, represents an "assert[ion] that it, not the people of Tennessee, is the *owner* of the river," in violation of "that portion of the [Tennessee Water Quality Control] Act which provides that 'the waters of Tennessee are the property of the state and are held in public trust for the use of the people of the state' "; and that TVA's plans to use the water for power generation violates "the entire intent of the Act which seeks to make the fullest use of the water resources of Tennessee."

On September 21, 1981, the Commissioner addressed a letter to TVA which stated that "the Commissioner will be investigating this complaint and you will be notified of his determination as soon as it is made," and that "[y]our appeal privileges are to the Water Quality Control Board."

Thereafter, on December 11, 1981, the Commissioner sent TVA a letter with which he enclosed a technical report by his department's Division of Water Quality Control and an opinion by the Tennessee Attorney General. The letter stated that he had "carefully evaluated both of the enclosed documents and find[s] that TVA's proposed activity requires a State water quality permit." The stated reasons for the finding were that "TVA's proposed diversion of the waters of the Ocoee River will constitute an '...alteration of the physical, chemical, radiological, biological, or bacteriological properties of ...waters of the State' "; "TVA's use of the diverted water to generate electricity at Powerhouse No. 2 constitutes '[t]he development of a natural resource...' "; and "T.C.A. 70-330(b) makes either of these activities unlawful unless it is carried out in accordance with the conditions of a valid permit." The letter further advised that TVA could appeal to

the Tennessee Water Quality Control Board within 30 days from its receipt of the letter.

During such 30-day period, TVA filed an appeal, removed it to this court, and filed the separate declaratory judgment action with which the appeal has been consolidated.

It is TVA's basic position that (1) the state and its officials have no authority to regulate or control federal action relating to the unified development of the Tennessee River system except to the extent Congress has expressly consented thereto, and (2) Congress has not consented to the regulation or control here involved.

The defendants submit that § 313 of the Clean Water Act requires the TVA to comply with state requirements respecting control and abatement of pollution. In other words, does that section waive the sovereign immunity otherwise possessed by the United States of America through the TVA. The statutory language is that each instrumentality of the executive branch of government engaging in any activity "resulting, or which may result, in the discharge or runoff of pollutants" shall be subject to State requirements, etc. The key words are "discharge or runoff of pollutants." The State cannot under the guise of regulation of discharge or runoff of pollutants exercise the right of control over a unified federal navigation, flood control and power operation, where federal sovereignty has been retained. Here there is solely a question of diversion. There is no discharge nor runoff of pollutants. Regardless of the desirability of recreational rafting, that issue is not present. The strained construction that somehow this diversion of water for a distance of 4.6 miles, passing through a flume, constitutes a discharge or runoff of pollutants is not impressive.

The motion of TVA for a summary judgment is sustained. The motion of the defendant is denied. An order will be entered.

/s/ L. Clure Morton
Chief Judge

APPENDIX C

Federal Clean Water Act Provisions

§1251. Congressional declaration of goals and policy

. . .

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

. . .

§ 1323. Federal facilities pollution control

(a) Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable

service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents or employees under any law or rule of law. Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent, or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 et seq. of Title 28. No officer, agent, or employee of the United States shall be personally liable for any civil penalty arising from the performance of his official duties, for which he is not otherwise liable, and the United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall

report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption. In addition to any such exemption of a particular effluent source, the President may, if he determines it to be in the paramount interest of the United States to do so, issue regulations exempting from compliance with the requirements of this section any weaponry, equipment, aircraft, vessels, vehicles, or other classes or categories of property, and access to such property, which are owned or operated by the Armed Forces of the United States (including the Coast Guard) or by the National Guard of any State, and which are uniquely military in nature. The President shall reconsider the need for such regulations at three-year intervals.

. . .

§ 1342. National pollutant discharge elimination system

Permits for discharge of pollutants

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for dischages into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreat-

ment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Suspension of federal program upon submission of State program; withdrawal of approval of State program

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(h)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

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§ 1370. State authority.

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

June 30, 1948, c. 758, Title V, § 510, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 893.

APPENDIX D

Tennessee Water Quality Control Act

Provision

69-3-108. Permits.—(a) Every person who is or is planning to carry on any of the activities outlined in subsection (b) of this section, other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, shall file an application for a permit with the commissioner or, when necessary, for modification of his existing permit.

(b) It shall be unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

(1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;

(2) The construction, installation, modification, or operation of any treatment works or part thereof, or any extension or addition thereto;

(3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;

(4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto; the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;

(5) The construction or use of any new outlet for the discharge of any wastes into the waters of the state;

(6) The discharge of sewage, industrial wastes or other wastes into waters, or a location from which it is likely that the discharged substance will move into waters; or

(7) The discharge of sewage, industrial wastes, or other wastes into a well or a location that is likely that the discharged substance will move into a well.

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APPENDIX E

Federal Register / Vol. 48, No. 195 /
Thursday, October 6, 1983 / Notices **45597-45598**

Under the NPDES Permit Regulation (48 FR 14146, April 1, 1983), EPA will provide **Federal Register** notice of actions by the Agency approving or modifying a State NPDES program. The following table will provide the public with an up-to-date list of the status of NPDES permitting authority throughout [the country].

	Approved State NPDES permit program	Approved to regulate Federal facilities	Approved State pretreatment program
Alabama	10/19/79	10/19/79	10/19/79
California	5/14/73	5/5/78	
Colorado	3/27/75		
Connecticut	9/26/73		6/3/81
Delaware	4/1/74		
Georgia	6/28/74	12/8/80	3/12/81
Hawaii	11/28/74	6/1/79	8/12/83
Illinois	10/23/77	9/20/79	
Indiana	1/1/75	12/9/78	
Iowa	8/10/78	8/10/78	6/3/81
Kansas	6/28/74		
Kentucky	9/30/83	9/30/83	9/30/83
Maryland	9/5/74		
Michigan	10/17/73	12/9/78	6/7/83
Minnesota	6/30/74	12/9/78	7/16/79
Mississippi	5/1/74	1/28/83	5/13/82
Missouri	10/30/74	6/26/79	6/3/81
Montana	6/10/74	6/23/81	
Nebraska	6/12/74	11/2/79	
Nevada	9/19/75	8/31/78	
New Jersey	4/13/82	4/13/82	4/13/82
New York	10/28/75	6/13/80	
North Carolina	10/19/75		6/14/82
North Dakota	6/13/75		
Ohio	3/11/74	1/28/83	7/27/83
Oregon	9/26/73	3/2/79	3/12/81
Pennsylvania	6/30/78	6/30/78	
South Carolina	6/10/75	9/26/80	4/9/82
Tennessee	12/26/77		8/10/83
Vermont	3/11/74		3/16/82
Virgin Islands	6/30/74		
Virginia	3/31/75	2/9/82	
Washington	11/14/73		
West Virginia	5/10/82	5/10/82	5/10/82
Wisconsin	2/4/74	11/26/79	12/24/80
Wyoming	1/30/75	6/18/81	

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